No. 12234

In the United States Court of Appeals for the Ninth Circuit

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER, APPELLANT

v.

MRS. DOROTHY WARD GINOCCHIO, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEVADA

APPELLANT'S REPLY BRIEF

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STATEMENT

Appellee has submitted a brief which offers no comment upon the undisputed fact that where there were two complete dwelling units before alteration of the duplex structure, only one dwelling unit existed after the structural changes (R. 79). The brief devotes but brief consideration to the substantial question whether as a result of the alterations such single dwelling unit constituted "additional housing accommodations created by conversion" within the meaning of the Act and Regulation (Appellant's brief, p. 3). The contentions which are advanced by appellee will be considered in the order appearing in her brief,

and will be discussed only to the extent that they are not covered in appellant's original brief.

ARGUMENT

I

Alterations of the duplex structure did not constitute additional housing accommodations within the meaning of the Act and Regulation

Pages 2 and 3 of the brief set forth various aspects in which the altered single dwelling unit differed from the former duplex structure. But as pointed out in the brief for appellant (p. 40), these structural changes resulting in the creation of additional floor space did not constitute additional housing accommodations. Whereas there were two dwelling units prior to the alterations, only one dwelling unit existed thereafter (R. 79).

As pointed out in the brief for appellant (pp. 36, 37), under the official interpretation of the Housing Expediter, the basis for determining whether additional housing accommodations were created is not whether there are more tenants or more floor space than before the alterations but "The determination is made by comparing the number of dwelling units before and after the conversion." The fact that two bedrooms on the ground floor and one bedroom in the basement were added, did not constitute additional housing accommodations (Appellant's brief, p. 42). The entire altered structure, and not the separate rooms therein existing after the alterations, constituted the housing accommodations involved, which were the subject of the Area Rent Director's order

rejecting decontrol (R. 115, Appellant's brief, p. 35).

The statement at page 3 of the brief that of the five bedrooms on the main floor, only the northerly two were in existence prior to the alterations is incorrect. As the appellant's brief points out (pp. 41–42), the northern or rear duplex unit consisted of two bedrooms and the southern or front unit consisted of one bedroom, making three bedrooms in the structure prior to the alterations so that only two additional bedrooms on the main floor were added (Defendant's Exhibits "H" and "I", R. 88, 89).

Page 3 of the brief refers to the action of the Rent Director in fixing the rental of the altered housing accommodation at $180 per month when a rental of $57.50 per month for one of the duplex units had previously existed and it is contended that by such procedure the Director considered the altered housing accommodations as not the same housing accommodations that the defendant had previously rented. Such fact is wholly immaterial. It is quite true that the single structure existing after the alterations was different from the two previous dwelling units. But the issue here is not whether *different* accommodations resulted from the structural changes, but solely whether *additional* housing accommodations were created as to entitle appellee to decontrol.

Here there was a decrease rather than increase in the number of dwelling units. For *different,* improved accommodations, other relief is provided, as for example adjustment of rent based upon Section 5 (a) (1) and Section 5 (a) (3) of the Rent Regula-

tion by reason of a major capital improvement of the housing accommodations and substantial increase in space, services, furniture, or equipment (Appellant's brief, pp. 8, 11). Appellee had already obtained the benefits of these adjustments which were authorized, but sought the further benefits of a complete exemption from the Act for which she was not qualified and which were not authorized.

Delsnider v. *Gould,* 154 F. 2d 844 (Brief pp. 4–5), has no application. That case arose under the District of Columbia Emergency Rent Act and not under the Housing and Rent Act of 1947 upon which the present action is predicated. It did not involve a question of decontrol but of adjustment. In such case where there were substantial improvement and alterations to a dwelling unit the Court recognized that the Administrator might adjust the rent ceiling " 'in such manner or amount as he deems proper to compensate' for the improvement or alteration, limited to a maximum equal to the rent generally prevailing for comparable accommodations" (154 F. 2d, p. 847). As shown above, in adjusting the rent of the altered duplex unit in the present case at $180 per month the Area Rent Director entered an order of such character under Section 5 (a) (1) and Section 5 (a) (3) of the Rent Regulation under the Housing and Rent Act. The cited case, therefore, in no respect supports the contention that an alteration of housing accommodations which does not create additional housing accommodations, entitles the landlord to the decontrol exemption of the Act.

II

In the absence of exhausting administrative remedies appellee was precluded from contesting the validity of the Rent Director's order holding the single dwelling unit to be a controlled housing accommodation

In pages 6 to 12 of the brief under various topical designations, appellee contends that the Court below did not err in permitting her to offer the defense that the altered structure was not a controlled housing accommodation. In support of this contention, at page 6 of the brief, appellee argues that the Housing and Rent Act of 1947 made no provision for review of orders by the Housing Expediter, and that nothing in the Act gives any degree of finality to any of the Expediter's orders. The latter contention may be disposed of briefly since there is no contention by the Expediter that his orders may not be subject to judicial review. The Expediter concedes that the Courts may review such orders but only after the exhaustion of administrative remedies which have been provided in the Procedural Regulation issued by him (12 F. R. 5916, Appellant's brief, pp. 17, 23, 55). The sole question remaining is whether the Expediter had the right by regulation or order to establish the orderly procedure for review of orders, which procedure he claims the appellee must first exhaust before challenging by way of defense the order of the Rent Director which rejected the application for decontrol (R. 115).

Section 204 (a) of the Act provides that the Housing Expediter shall administer the powers, functions, and duties under Title II thereof relating to Maxi-

mum Rents,[1] and Section 204 (d) confers plenary authority on the Expediter to issue such regulations and orders as he may deem necessary to carry out the provisions of that section and Section 202 (c).[2] Section 202 (c) (3) provides as an exception to controlled housing accommodations those accommodations created by conversion on or after February 1, 1947, which is the exception upon which the defendant attempts to rely (Brief for appellant, p. 3). The broad authority conferred upon the Expediter is further evident from other provisions of the Act.[3] Pursuant to Section 204 (d) the Housing Expediter issued Rent Procedural Regulation 1 (Appellant's brief, p. 4), for review of orders of the character here involved, and

[1] Section 204 (a) of the Act, as amended by Public Law 31, Housing and Rent Act of 1949, 81st Congress, reads:

"Sec. 204. (a) The Housing Expediter shall administer the powers, functions, and duties under this title; and for the purpose of exercising such powers, functions, and duties, and the powers, functions, and duties granted to or imposed upon the Housing Expediter by title I of this Act, the Office of Housing Expediter is hereby extended until the close of June 30, 1950."

At the date of trial January 19, 1949 (R. 31) the language of the quoted section was the same except that the expiration date of the Act was then stated as March 31, 1949.

[2] Section 204 (d) of the Act reads:

"(d) The Housing Expediter is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this section and section 202 (c)."

[3] By Section 204 (e) of the Act the Expediter is authorized and directed to create and continue in existence rent advisory boards (Appellant's brief, p. 53). And by Section 204 (b) the Expediter is empowered to remove any or all maximum rents in any defense-rental area, or portion thereof with respect to any class of housing accommodations if in his judgment the need for continuing maximum rents in such area no longer exists (App. *infra*. p. 14).

the order of the Area Rent Director rejecting decontrol of the housing accommodations was issued (R. 115)[4] pursuant to such section.

In considering the authority conferred by Section 204 (d) on the Housing Expediter to issue orders and regulations necessary to carry the Act into effect, in *Woods* v. *Benson Hotel Corp.,* 75 F. Supp. 743 (D. C. Minn.), affirmed, 168 F. 2d 694 (C. A. 8th), it is said by the lower Court (at p. 747):

> However, by the express language of Section 204 (d) "the Housing Expediter is authorized to issue such regulations and orders, consistent with the provisions of this title, as he may deem necessary to carry out the provisions of this section and Section 202 (c)." This express reference to 202 (c) when coupled with the wording of that section makes it apparent that Congress intended to give the Expediter authority to issue regulations so as to make the section more specific in view of the policy and purposes of the Act.

It must be manifest from both Sections 204 (a) and 204 (d) of the Act that in issuing Rent Procedural Regulation 1 (Appellant's brief, p. 4), the Expediter was acting wholly consistent with the au-

[4] Section 825.1 of the Controlled Housing Regulation (12 F. R. 4331) in part reads: * * *

"'Expediter' means the Housing Expediter or the Rent Director or such other person or persons as the Expediter may appoint or designate to carry out any of the duties delegated to him by the Act.

"'Rent Director' means the person designated by the Expediter as director of the defense-rental area or such person or persons as may be designated to carry out any of the duties delegated to the Rent Director by the Expediter."

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thority conferred by the Act, rather than in conflict with it, as appellee contends. This point is now established by the decisions of four Courts of Appeals, including this Court (see *Babcock* v. *Koepke,* 175 F. 2d 923 (C. A. 9th); *Gates* v. *Woods,* 169 F. 2d 440 (C. A. 4th); *Woods* v. *Durr,* 176 F. 2d 273 (C. A. 3rd); *Smith* v. *Duldner,* 175 F. 2d 629 (C. A. 6th)).

The attempt to distinguish *Koster* v. *Turchi,* 173 F. 2d 605 (C. A. 3rd), at page 8 of the brief, is specious. Appellee contends that the tenants were required to exhaust their administrative remedies in that case, looking to a reduction in rent, before seeking equitable relief because the prescribed procedure in that case was in accord with Section 204 (b). This section provides that the Housing Expediter shall by regulation or order make such adjustments in maximum rents as may be necessary to correct inequities or further carry out the purposes of this title (*infra,* p. 14). In issuing Rent Procedural Regulation 1 which requires persons in the position of appellee here to proceed with her administrative review where claims of decontrol under Section 202 (c) are rejected, the Housing Expediter was proceeding in strict accordance with Section 204 (d) of the Act. This section provides that the Expediter may "issue such regulations and orders, * * * as he may deem necessary to carry out the provisions of * * * Section 202 (c)," (*supra,* p. 6). It is under Section 202 (c) that appellee claims decontrol in this case.

Appellee's attempt to argue (Brief, p. 12) that the decision of *Gates* v. *Woods, supra,* should not be followed is unpersuasive (Appellant's brief, p. 23).

The carefully considered opinion rendered in that case has been consistently adhered to and followed (see *Smith* v. *Duldner, supra,* at p. 631; *Koster* v. *Turchi,* 173 F. 2d 605, at p. 608 (C. A. 3rd)).

In view of what is said above that the Courts properly have the right to review determinations of the Housing Expediter after administrative remedies have been exhausted,[5] there is no point to answering appellee's argument (Brief, pp. 8–9) that the Housing Expediter may not have exclusive power to determine his own jurisdiction. That the Expediter has the right to make the initial determination whether housing accommodations are subject to the Act and regulations cannot be denied (see *Graylyn-Bainbridge Corp.* v. *Woods,* 173 F. 2d 790 (C. A. 8th), certiorari denied, 17 U. S. L. W., p. 3376; cf. *Endicott-Johnson Corp.* v. *Perkins,* 372 U. S. 501; *Oklahoma Publishing Company* v. *Walling,* 327 U. S. 186.

For the reasons stated above there is also no reason for answering the argument (Brief, pp. 9–10) that the Housing Expediter may not by regulation enlarge the scope of the Act. We have shown that the regulation is fully consistent with the language and purpose of the Act and not inconsistent with it. So, too, no fruitful purpose would be served in replying to the contention of appellee (Brief, pp. 10–12) that

[5] The rule as to exhaustion of administrative remedies applies not only to cases where the party subject to such rule is plaintiff but also where an issue is raised by way of defense (*La Verne Co-op Citrus Ass'n.* v. *United States,* 143 F. 2d 415, 419 (C. A. 9th); *Yakus* v. *United States,* 321 U. S. 414; *United States* v. *Ruzicka,* 329 U. S. 387; Brief for Appellant, p. 22).

court review is contemplated by the Act. This is not disputed. But the question here is whether appellee has the right in seeking court review to short circuit the administrative procedure that is still available for orderly disposition of her contentions. The Supreme Court decision in *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752 (Appellant's brief, p. 33), as well as the decision of this Court in *Babcock* v. *Koepke, supra,* and of *Smith* v. *Duldner, Woods* v. *Durr,* and *Gates* v. *Woods, supra,* make it clear beyond dispute that appellee has no standing to object to the validity of the Regulation until she has exhausted her administrative remedies.

Estep v. *United States,* 327 U. S. 114 (Brief, p. 11) does not aid the contention of appellee but supports the rule that administrative remedies must be exhausted before review of an administrative order by the courts. In this decision which involved a criminal prosecution under the Selective Training and Service Act of 1940, an order of the Local Board had fixed the classification of Estep who refused, however, to be inducted into military service, claiming exemption as an ordained minister of the gospel. In holding that the jurisdiction of the Board might be challenged in judicial proceedings, the Court said (327 U. S. p. 123):

> Here these registrants had pursued their administrative remedies to the end. All had been done which could be done.

Woods v. *Western Holding Corp.,* 173 F. 2d 655 (Brief, p. 12) is also wholly inapplicable to any contention urged by appellee. The sole issues presented

in that case were whether the structures there involved in Kansas City, Missouri, were "commonly known" as hotels in that community so as to be exempt from control under Section 202 (c) (1) of the Housing and Rent Act of 1947 (*infra,* p. 14), and whether the services supplied constituted "customary hotel services" within the meaning of the Act and Regulation. No question as to the exhaustion of administrative remedies was presented, nor was any question present as to whether additional accommodations were created to make available the exemption involved in the instant case.

Other decisions cited in the brief have no application to the Act and Regulation being considered. As such cases are manifestly not in point in fact or principle, no purpose would be served in discussing them.

III

The defendant did not exhaust her administrative remedy

At page 14 of the brief it is asserted that Section 840.23 of Rent Procedural Regulation 1 provides that a landlord may apply for review to the Regional Rent Administrator or to the Housing Expediter but does not provide that both remedies may be pursued. Such statement is incorrect. As the brief for appellant points out (pages 28, 32) under Section 840.25 of the Procedural Regulation, the defendant had the right of appeal to the Housing Expediter in the event the letter of February 10, 1948, from the Regional Administrator to Appellee's attorney should be regarded as a "decision" (R. 70). In such letter the Regional Administrator advised that investiga-

tion disclosed that the proceedings in the Area Rent Office were handled in accordance with the Rent Regulations and the interpretation of the Regional Attorney (R. 44).

Section 840.24 of the Procedural Regulation (Appellant's brief, p. 58) which states the procedure by the Regional Rent Administrator on applications for review provides that an order entered by the Administrator shall be effective and binding until changed by further order "and shall be final subject only to appeal as provided in Section 840.25 and following of this part." By Section 840.25 of the Regulation the right of appeal to the Housing Expediter from "an order issued under Section 840.24 (except an order remanding to the Rent Director)," is expressly provided (Appellant's brief, p. 59). There was no order of the Regional Administrator remanding the proceeding to the Rent Director and defendant did not pursue such administrative remedy to a conclusion as the Regulation provided. As was pointed out in *Aircraft & Diesel Corp.* v. *Hirsch,* 331 U. S. 752 (Brief for appellant, pp. 32–33), the machinery must not only be put in motion but also must "be fully performed, before judicial intervention should take place * * *" (331 U. S. at p. 771). "Exhaustion, not merely initiation" of the administrative procedure is required (331 U. S. at p. 774). Defendant was, therefore, precluded from urging the defense in the Court below that the order of the Rent Director rejecting decontrol (R. 115) was erroneous where she had failed to carry her review to the Housing Expediter.

At pages 14 and 15 of the brief while admitting, in effect, that the Procedural Regulation permitted a further appeal to the Housing Expediter, it is contended that the filing of the present action would have halted the pursuit of any administrative remedy by the defendant. There is no merit to such contention. Moreover, the defendant upon availing herself of a further appeal to the Expediter under Section 840.25 might properly have applied for and obtained a stay of the present enforcement proceeding until the prescribed administrative procedure had been exhausted (Appellant's brief, pp. 34–35).

CONCLUSION

It is submitted that the judgment should be reversed upon the ground that the alterations of the duplex structure resulting in the single dwelling unit where two separate dwelling units had previously existed did not constitute "additional housing accommodations created by conversion" within the meaning of the Act and Regulation, and upon the further ground that appellee failed to exhaust her administrative remedies for review of the administrative order which determined that such dwelling unit continued subject to control.

Respectfully submitted.

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APPENDIX

Pertinent provisions of the Housing and Rent Act of 1947, as amended (50 U. S. C., App., Secs. 1881 et seq.):

SEC. 202. As used in this Title—

* * * * *

(c) The term "controlled housing accommodations" means housing accommodations in any defense-rental area, except that it does not include—

(1) those housing accommodations, in any establishment which is commonly known as a hotel in the community in which it is located, which are occupied by persons who are provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service.

SEC. 204 (b) (1). Subject to the provisions of paragraphs (2) and (3) of this subsection, during the period beginning on the effective date of this title and ending on the date this title ceases to be in effect, no person shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the Emergency Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947: *Provided, however,* That the Housing Expediter shall, by regulation or order, make such individual and general adjustments in such maximum rents in any defense-rental area or any portion thereof, or with respect to any housing accommodations or any class of hous-

ing accommodations within any such area or any portion thereof, as may be necessary to remove hardships or to correct other inequities, or further to carry out the purposes and provisions of this title. In the making of adjustments to remove hardships due weight shall be given to the question as to whether or not the landlord is suffering a loss in the operation of the housing accommodations * * *.

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